A

MUN CHOL MYONG v. MINISTER OF HOME AFFAIRS & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD SHAHRIR MOHD SALLEH JC
[CRIMINAL APPLICATION NO: WA-44-339-12-2019]
4 NOVEMBER 2020

B

ADMINISTRATIVE LAW: *Habeas corpus – Writ – Issuance – Application for – Applicant Citizen of Democratic People's Republic of Korea staying in Malaysia wanted by Government of United States of America for money laundering offences – Whether there was binding agreement between Malaysia and requesting State – Element of dual criminality – Whether satisfied – Whether procedures under s. 20 of Extradition Act 1992 applicable – Whether offences committed of political character – Whether there was sufficient evidence for extradition request – Whether conditions for committal met by detaining authority – Extradition Act 1992, ss. 6(2), 13(1)(b), 16*

C

D

CRIMINAL PROCEDURE: *Extradition – Order for committal to prison pending extradition – Citizen of Democratic People's Republic of Korea staying in Malaysia wanted by Government of United States of America for money laundering offences – Whether there was binding agreement between Malaysia and requesting State – Element of dual criminality – Whether satisfied – Whether procedures under s. 20 of Extradition Act 1992 applicable – Whether offences committed of political character – Whether there was sufficient evidence for extradition request – Whether conditions for committal met by detaining authority – Extradition Act 1992, ss. 6(2), 13(1)(b), 16*

E

F

CRIMINAL LAW: *Extradition – Request – Citizen of Democratic People's Republic of Korea staying in Malaysia wanted by Government of United States of America for money laundering offences – Whether there was binding agreement between Malaysia and requesting State – Element of dual criminality – Whether satisfied – Whether procedures under s. 20 of Extradition Act 1992 applicable – Whether offences committed of political character – Whether there was sufficient evidence for extradition request – Whether conditions for committal met by detaining authority – Extradition Act 1992, ss. 6(2), 13(1)(b), 16*

G

The applicant, a citizen of the Democratic People's Republic of Korea ('DPRK'), had been staying in Malaysia since 2008. The applicant was wanted by the Government of the United States of America ('US') to be produced before the US District Court in the District of Columbia to answer a total of five charges (indictments) *vide* case 1:19-cr-147 in the case of *United States of America v. Mun Chol Myong & Ors*. The charges were related to the offence of money laundering allegedly committed between the month of April 2013 and the month of November 2018 in violation of Title 18 of the United States Code, § 1956(a)(2)(A) and 1956(a)(2)(B) and conspiracy to launder monetary instruments in violation of Title 18 of the United States Code, § 1956(h). According to investigations carried out by the US Federal

H

I

Bureau of Investigation, the applicant was involved in a network of illegal money laundering scheme for himself and his customers located in North Korea and some of these customers had been sanctioned by the United Nations ('UN'). The illicit scheme involved a network of companies used as a front in purchases to process transactions through US correspondent accounts on behalf of North Korean entities which were otherwise barred from the US financial system. On 3 May 2019, the Government of the US made a request for a provisional warrant of apprehension to be issued against the applicant, made pursuant to s. 13(1)(b) of the Extradition Act 1992 ('the Act') and art. 11 of the US Extradition Treaty. On 13 May 2019, the fourth respondent made an application at the Magistrate's Court for the issuance of the provisional warrant of apprehension and it was granted on the same day. Armed with the warrant, the applicant was arrested the following day. An order for the applicant to be remanded for a further 60 days was later made by the Magistrate on 14 May 2019 and on 12 July 2019, the case was transmitted to the Sessions Court in accordance with s. 16 of the Act. On 10 June 2019, the Government of the US made an extradition request to the Government of Malaysia for the applicant to be extradited to the US. This extradition request was made through diplomatic channel pursuant to art. 7 of the US Extradition Treaty. Based on the extradition request, the fourth respondent applied for the applicant to be committed to prison pending the order of the Minister of Home Affairs for his surrender to the US. On 13 December 2019, the Sessions Court Judge ('SCJ') allowed the application and issued the warrant of committal for the applicant to be committed to prison pending his surrender for extradition. Thus, the applicant applied for the issuance of a writ of *habeas corpus*. In challenging the warrant of committal, the applicant based his submissions on four broad grounds (i) the respondents had failed to satisfy the element of dual criminality; (ii) the offence allegedly committed by the applicant for which the request for extradition was made was a political offence or an offence of a political character; (iii) the respondents had failed to prove a *prima facie* case against the applicant; and (iv) the applicant did not commit the alleged money laundering offences. The issues that arose were (i) whether there was a binding arrangement between Malaysia and the requesting State; (ii) whether the detention was lawful; (iii) the dispensation of *prima facie* requirement under s. 20; (iv) whether the procedures under s. 20 had been complied with; (v) whether the offences for which the request for extradition of the applicant was made were offences of a political character and (vi) whether there was sufficient evidence for extradition request.

Held (dismissing application):

(1) The arrangement between Malaysia and the US for the extradition of fugitive criminals was inked *vide* the US Extradition Treaty. The US Extradition Treaty was published in the *Gazette vide* PU(A) 213/1997 as the Extradition (United States) Order 1997 ('US Extradition Order'). It

came into force on 2 June 1997. This satisfied the requirement of having a binding arrangement in order for the Extradition Act 1992 to apply between Malaysia and the US. (para 16)

(2) The applicant was facing a total of five charges (indictments) in the US. One charge was for conspiracy to launder monetary instruments under Title 18 of the United States Code, § 1956(h) and the other charges were for international money laundering under Title 18 of the United States Code, § 1956(a)(2)(A). If committed within the jurisdiction of Malaysia, these offences correspond respectively with the offence of criminal conspiracy to commit a money laundering offence under s. 86A(1)(c) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUAA') and the offence of money laundering under s. 4(1) of the AMLATFPUAA. The offences under the law of the US provide, upon conviction, for a fine not exceeding USD500,000 or twice the value of monetary instrument or funds involved, whichever was greater, or imprisonment of not more than 20 years, or both. The offences under our AMLATFPUAA provide, upon conviction, for imprisonment for a term not exceeding 15 years and shall also be liable to a fine of not less than five times of the amount involved or RM5 million, whichever was the higher. In this regard, the statutory threshold of penalty under s. 6(2) of the Extradition Act 1992 had been satisfied and the pending charges against the applicant in the US showed that they were charges for extradition offences within the meaning of s. 6(2) of the Act. This court was also satisfied that the element of dual criminality had been satisfied. Since the applicant was accused of extradition offences in the US and was, at the material time, in Malaysia, the applicant was a 'fugitive criminal' within the meaning of s. 2 of the Act. (paras 20-23)

(3) The procedures under s. 20 of the Extradition Act 1992 applies in cases where the Minister of Home Affairs gives a written direction pursuant to s. 4 of the Act. The order of the Minister under s. 4 relates to the dispensation of the *prima facie* requirement. Dispensation of the *prima facie* requirement must be provided for in the binding arrangement between Malaysia and the country which made the extradition request. Herein, the written direction of the Minister was appended as exh. M-5 in the proceedings before the Sessions Court. It directed for the procedures under s. 20 of the Act to apply. Thus, the Minister had indeed given a written direction under and pursuant to the circumstances as provided for under s. 4 of the Act. As such, the procedures under s. 20 of the Act must apply. (paras 26, 30 & 31)

(4) As defined under s. 20(3) of the Act, the following supporting documents had been produced before the Sessions Court: (i) the warrant of arrest was issued for the indictment of the applicant; (ii) the statement in writing setting out a description of and the penalty applicable in respect of the offence and a duly authenticated statement in writing

setting out the conduct constituting the offence; and (iii) a certificate under the hand of the Attorney General of the United States certifying the Associate Director of the Office of International Affairs, Criminal Division of the United States Department of Justice, as duly commissioned and qualified to authenticate the affidavit. In the circumstances, the conditions under s. 20(1)(b) of the Act had been satisfied. (paras 34 & 35)

(5) Where the supporting documents demonstrate a violation of the criminal law in the requesting State and the request for extradition is clearly connected with the effort of the requesting State to enforce the violation of that criminal law, it could not by any means be described as an offence of a political character. In other words, an act which could be brought within the ambit of the criminal law of the requesting State could not be political. Despite challenging the detention order on the basis that the request for extradition was based on politically charged offences, the applicant did not provide sufficient evidence to support this challenge against the backdrop of the money laundering related-indictments. There was also nothing to suggest that the applicant, as an individual, was at odds with the US on issues relating to political control or the Government of the day. The fact that the US was seeking to enforce Title 18 of the USC against the applicant and the written statement describing the circumstances of the commission of the extradition offence in the circumstances of the present application was sufficient to dispel any suggestion that the offences were offences of a political character. The applicant had failed to discharge the onus placed on him under s. 20(1)(d)(i) of the Act. (paras 51 & 52)

(6) Section 20(2) of the Act prohibits the applicant from adducing and the court from receiving any evidence to contradict the allegation that the applicant had committed the extradition offence for which his return is sought by the requesting State. The powers of the Sessions Court are limited and clearly spelt out under s. 20 of the Act. In considering the application for a warrant of committal, the Sessions Court is not at liberty to be concerned with the question of the evidence constituting the offence in the requesting State of which it had no jurisdiction. That is a matter to be dealt with by the trial court in the requesting State. The Sessions Court must only be concerned with whether the conditions for committal as stipulated under the Act have been met by the detaining authority. If they have, then the warrant of committal must be issued. Otherwise, the detenu must be discharged. There is no determination of whether the detenu is guilty or not guilty. A court sitting in a committal proceeding for the purposes of an extradition request is not expected to follow the normal procedures in a trial. Extradition proceedings are sui generis and could not be likened to a criminal trial. After all, it is a committal proceeding and not a trial. (paras 54, 56 & 57)

(7) There was no procedural irregularity in the issuance of the warrant for committal of the applicant by the SCJ. The applicant's application for *habeas corpus* was thereby dismissed and the warrant for committal granted by the Sessions Court to detain the applicant pending the issuance of the order by the Minister for his surrender was upheld. (para 58)

Case(s) referred to:

Cheng v. Governor of Pentonville Prison [1973] AC 931 ***(refd)***

In Re Castioni [1891] 1 QB 149 ***(refd)***

Menteri Dalam Negeri, Malaysia & Anor v. Seyed Ramin Paknejad [2017] 4 CLJ 541 FC ***(refd)***

Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 8 CLJ 465 FC ***(refd)***

Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor [2013] 5 CLJ 447 FC ***(refd)***

Schtraks v. Government of Israel And Others [1962] 3 All ER 529 ***(refd)***

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 4(1), 86A(1)(c)

Extradition Act 1992, ss. 2(2), 4, 5, 6(2), (3), 8(a), (b), (c), 12(3), 13(1)(b), 16(1), (2), 19, 20(1)(a), (b), (c), (d)(i), (e), (2), (3), 36

Extradition (United States) Order 1997, paras. 3, 4

Federal Constitution, arts. 5, 8, 121

Penal Code, s. 415

Extradition Act 1870 [UK], s. 3(1)

18 US Code [US], § 1956(a)(2)(A), (B), (h)

For the applicant - Gooi Soon Seng & Choong Kak Sen; M/s Gooi & Azura
For the respondents - Lim Ju Vynn & Faizul Asnad Masri; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Shahrir Mohd Salleh JC:

Introduction

[1] This is an application for the issuance of a writ of *habeas corpus*. Pursuant to a request on 3 May 2019 made by the Government of the United States of America ("US") for the provisional arrest of the applicant, the applicant was arrested on 14 May 2019 at his residence at C-13-1, Kondominium Gembira Residen, Jalan Senang Ria, Taman Gembira, Kuala Lumpur. The request by the US Government was made pursuant to the agreement and exchange of notes dated 3 August 1995 ("US Extradition Treaty").

[2] On 14 May 2019 itself, the applicant was brought before the Magistrate's Court and an order under s. 16(1) of the Extradition Act 1992 was obtained for the applicant to be remanded in custody for 60 days. On 8 July 2019, the Minister of Home Affairs issued an order under s. 12(3) of the Extradition Act 1992 signifying to the Magistrate that a requisition has been made by the US for the return of the applicant. On 12 July 2019, the learned Magistrate transmitted the case to the Sessions Court pursuant to s. 16(2) of the Extradition Act 1992 and extended the applicant's remand until his appearance before the Sessions Court.

[3] On 19 July 2019, the fourth respondent filed an application under s. 20 of the Extradition Act 1992 for the applicant to be committed to prison pending an order to be issued by the Minister for the applicant to be surrendered for extradition to the US. On 13 December 2019, the learned Sessions Court Judge allowed the application and the applicant was committed to prison pending his surrender. On 26 December 2019, the applicant filed the present application to challenge the order dated 13 December 2019.

Brief Matrix Of Facts

[4] The applicant is a citizen of the Democratic People's Republic of Korea (DPRK) and has been staying in Malaysia since 2008. *Vide* a letter dated 3 April 2019 issued by the Immigration Department of Malaysia, the applicant has been accepted as a participant in the "Malaysia My Second Home Programme" and granted a social visit pass for the period of ten years.

[5] The applicant is wanted by the US Government to be produced before the US District Court in the District of Columbia to answer a total of five charges (indictments) *vide* Case 1:19-cr-147 in the case of *United States of America v. Mun Chol Myong & 3 Ors*. The charges relate to the offence of money laundering allegedly committed between the month of April 2013 and the month of November 2018 in violation of Title 18 of the United States Code, § 1956(a)(2)(A) and 1956(a)(2)(B) and conspiracy to launder monetary instruments in violation of Title 18 of the United States Code, § 1956(h).

[6] Pursuant to a regime of United Nation (UN) sanctions imposed against North Korea as well as the special measures implemented by the Financial Crimes Enforcement Network (FinCEN) of the US Treasury Department under the US Bank Secrecy Act aimed at specific money laundering and terrorist financing concerns, North Korean companies are prevented from purchasing certain items as well as engaging in financial transactions with sanctioned entities. North Korean companies are also prevented from using the US financial system including the use of US dollar accounts at correspondent banks.

[7] According to investigations carried out by the US Federal Bureau of Investigation, the applicant is involved in a network of illegal money laundering scheme for himself and his customers located in North Korea. Some of these customers have been sanctioned by the United Nations (UN). The illicit scheme involved a network of companies used as a front in purchases to process transactions through US correspondent accounts on behalf of North Korean entities which were otherwise barred from the US financial system.

[8] Investigations also revealed that the applicant and his co-conspirators used different methods to conceal the true nature of the transactions from the banks when due diligence were conducted by the banks as part of their anti-money laundering obligations. This included the use of front companies, regular change of banks, concealing references to North Korea in banking forms and falsification of shipping documents.

[9] On 3 May 2019, the Government of the US made a request for a provisional warrant of apprehension to be issued against the applicant. This request was made pursuant to s. 13(1)(b) of the Extradition Act 1992 and art. 11 of the US Extradition Treaty. On 13 May 2019, the fourth respondent made an application at the Magistrate's Court for the issuance of the provisional warrant of apprehension and it was granted on the same day. Armed with the warrant, the applicant was arrested the following day. An order for the applicant to be remanded for a further 60 days was later made by the Magistrate on 14 May 2019 and on 12 July 2019, the case was transmitted to the Sessions Court in accordance with s. 16 of the Extradition Act 1992.

[10] On 10 June 2019, the Government of the US made an extradition request to the Government of Malaysia for the applicant to be extradited to the US. This extradition request was made through diplomatic channel pursuant to art. 7 of the US Extradition Treaty. Based on the extradition request, the fourth respondent applied for the applicant to be committed to prison pending the order of the Minister of Home Affairs for his surrender to the US. On 13 December 2019, the learned Sessions Court Judge allowed the application and issued the warrant of committal for the applicant to be committed to prison pending his surrender for extradition.

The Application

[11] The applicant filed a notice of motion on 26 December 2019 and prays for the following reliefs:

(i) that the order dated 13 December 2019 granted by the learned Sessions Court Judge for the applicant to be held in custody pending his extradition be set aside and/or be declared null and void;

(ii) that the applicant be brought before this Honourable Court and be set at liberty immediately; and

(iii) for any further and/or other orders as this Honourable Court deems fit.

The Affidavits

[12] The affidavits filed for and against the application are as follows:

(i) "afidavit sokongan" affirmed on 24 December 2019 by Mun Chol Myong (encl. 2), the applicant,

(ii) "afidavit jawapan" affirmed on 13 February 2020 by Wan Nor Sakina binti Saad (encl. 8) for and on behalf of the respondents,

(iii) "afidavit jawapan 2" affirmed on 13 February 2020 by Rosoman bin Abu Bakar @ Che Din (encl. 9) for and on behalf of the respondents,

(iv) "afidavit sokongan (2)" affirmed on 5 June 2020 by Mun Chol Myong (encl. 12), the applicant,

(v) "afidavit jawapan 3" affirmed on 26 June 2020 by Wan Nor Sakina binti Saad (encl. 13) for and on behalf of the respondents, and

(vi) "afidavit sokongan (3)" affirmed on 6 July 2020 by Mun Chol Myong (encl. 15), the applicant.

Brief Deliberations

Brief Contention Of The Applicant

[13] In challenging the warrant of committal, learned counsel for the applicant based his submissions on four broad grounds which may be summarised as follows:

(i) the respondents have failed to satisfy the element of dual criminality:

(a) the money laundering offences allegedly committed by the applicant are based on violations of sanctions imposed against North Korea by the UN and the US authorities. These violations do not constitute offences of money laundering in Malaysia under the AMLATFPUAA,

(b) the charges proffered by the US authorities against the applicant are predicated on the offence of bank fraud but it is not an offence in Malaysia,

(c) even if the offence of bank fraud were to constitute the offence of cheating under s. 415 of the Malaysian Penal Code, it is not an extra-territorial offence.

(ii) the offence allegedly committed by the applicant for which the request for extradition is made is a political offence or an offence of a political character:

A (a) the offences allegedly committed by the applicant for which the request for extradition was made are based on the embargo or sanctions against North Korea imposed by the US and the allegation that the applicant was affiliated with the primary intelligence organisation of North Korea, namely the Reconnaissance General
B Bureau (RGB),

(b) although the US indictments show that the applicant is charged together with three other individuals, the extradition request is only made against the applicant and not against the other non-North Korean individuals.

C
(iii) the respondents have failed to prove a *prima facie* case against the applicant:

(a) most of the transactions as alleged in the indictments were not supported by any documentary evidence and there are no financial
D records or forensic accounting reports showing the alleged money transfers and money trails which are required in order to make out a *prima facie* case against the applicant,

(b) section 4 of the Extradition Act 1992 read together with art. 7(3)(c) of the US Extradition Treaty resulted in the applicant being denied
E of his right to a fair trial. This is against the constitutional guarantee under arts. 5 and 8 of the Federal Constitution. It also usurped the judicial powers vested in this Honourable Court as enshrined under art. 121 of the Federal Constitution,

(c) section 20(2) of the Extradition Act 1992 has infringed the
F fundamental rights of the applicant under art. 5 of the Federal Constitution and requirement of proportionality under art. 8 of the Federal Constitution. Section 20(2) of the Extradition Act 1992 ought to be struck down.

G (iv) the applicant did not commit the alleged money laundering offences:

(a) the applicant was merely an employee of Sinsar Trading Pte Ltd ("Sinsar") and had no authority over the accounts of Sinsar,

(b) the applicant had no access to the accounts of Sinsar,

H (c) the applicant was not involved in receiving orders for and arranging the shipment of goods,

(d) the limited job scope of the applicant made it impossible for him to have committed the alleged money laundering offences.

I

Brief Contention Of The Respondents

[14] The learned Senior Federal Counsel maintains that there is no procedural irregularity in the detention of the applicant. In response to the contention of learned counsel for the applicant, the contention of the learned Senior Federal Counsel may be summarised as follows:

(i) the requirement of dual criminality has been satisfied:

(a) in determining the requirement of dual criminality, it is the conduct of the applicant which constituted the offence in the requesting State which must be considered and compared with the corresponding offence in the requested State,

(b) the offences committed by the applicant correspond with (1) the offence of engaging in a criminal conspiracy to commit an offence under the AMLATFPUAA which is an offence under s. 86A(1)(c) of the AMLATFPUAA, and (2) the offence of money laundering under s. 4(1) of the AMLATFPUAA,

(ii) the offence committed by the applicant for which the request for extradition is made is not an offence of a political character:

(a) the applicant is wanted by the Government of the US for offences related to money laundering. Offences related to money laundering are not offences of a political character and do not qualify as offences of a political character as described in *In re Castioni* [1891] 1 QB 149 and *Cheng v. Governor of Pentonville Prison* [1973] AC 931,

(b) in its request to extradite the applicant, the Government of the US is merely enforcing its criminal laws,

(iii) there is no requirement for a *prima facie* case to be proved against the applicant before the warrant of committal may be issued:

(a) the Minister of Home Affairs has issued a written direction under s. 4 of the Extradition Act 1992 to dispense with the *prima facie* requirement,

(b) the procedures under s. 20 of the Extradition Act 1992 instead, applied,

(iv) evidence to show that the applicant is not involved in the offence for which his extradition is requested is not a defence to the committal proceedings as provided for under s. 20(1)(d) of the Extradition Act 1992:

(a) pursuant to s. 2(2) of the Extradition Act 1992, the applicant is not entitled to adduce and this court is not entitled to receive any evidence to contradict the allegation that the applicant has committed the act which constitutes the extradition offence for which his return is sought.

Analysis And Findings

Binding Arrangement Between Malaysia And The Requesting State

[15] Under the Extradition Act 1992, extradition of fugitive criminals may be made if there is in existence a binding arrangement between Malaysia as the requested State and the requesting State and that binding arrangement has been published in the *Gazette* pursuant to the order of the Minister of Home Affairs. This is provided for under s. 2 of the Extradition Act 1992.

Section 2 of the Extradition Act 1992 provides as follows:

> Order of the Minister
>
> 2. (1) Where a binding arrangement has been entered into between Malaysia and any country for the extradition of fugitive criminals, the Minister may, by order to be published in the *Gazette* reciting or embodying the terms of such arrangement, direct that the provisions of this Act shall apply to that country subject to any restriction, exception, modification, adaptation, condition or qualification contained in the order.
>
> (2) Where any arrangement referred to in this section is revoked or lapses, the Minister shall, by order published in the *Gazette*, forthwith certify that fact; and any such order shall be conclusive evidence that the arrangement referred to therein has been revoked or has lapsed, as the case may be, and shall not be questioned in any legal proceedings whatsoever.
>
> (3) Any order made under this section shall be laid before each House of Parliament as soon as may be after it is made.
>
> (4) An order made under this section shall be conclusive evidence that the arrangement therein referred to complies with the provisions of this Act, and that this Act applies in the case of the country mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatsoever.

[16] The arrangement between Malaysia and the US for the extradition of fugitive criminals was inked *vide* the US Extradition Treaty. The US Extradition Treaty was published in the *Gazette vide* P.U.(A) 213/1997 as the Extradition (United States) Order 1997 ("US Extradition Order"). It came into force on 2 June 1997. This satisfies the requirement of having a binding arrangement in order for the Extradition Act 1992 to apply between Malaysia and the US.

Fugitive Criminal And Dual Criminality

[17] In order to determine whether the applicant fits into the definition of "fugitive criminal" under the Extradition Act 1992, one needs to consider the respective definitions of "fugitive criminal" and "extradition offence" in s. 5 as well as ss. 6(2) and 6(3) of the Act which provides for "extradition offence".

Section 5 of the Act reads as follows:

"Interpretation

5. In this Act, unless the context otherwise requires:

"extradition offence" means an offence described in subsection 6(2) or 6(3);

"fugitive criminal" means any person who is accused of or convicted of an extradition offence committed within the jurisdiction of another country and is, or is suspected to be, in some part of Malaysia;.

[18] It is also the legal requirement under s. 6 of the Act that the act committed by the applicant which constitutes the offence must be an offence in both the requesting and requested States and must have been committed in the territory of the requesting State in order for it to qualify as an extradition offence. (See: *Menteri Dalam Negeri, Malaysia & Anor v. Seyed Ramin Paknejad* [2017] 4 CLJ 541 FC; [2017] 4 MLJ 303; [2017] 5 MLRA 202; [2017] 3 AMR 368).

Section 6 of the Act provides as follows:

Extradition offence

6. (1) A fugitive criminal shall only be returned for an extradition offence.

(2) For the purposes of this Act, an extradition offence is an offence, however described, including fiscal offences:

(a) which is punishable, under the laws of a country referred to under paragraph 1(2)(a) or 1(2)(b), with imprisonment for not less than one year or with death; and

(b) which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death:

Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.

(c) An offence shall also be an extradition offence if it consists of an attempt or a conspiracy to commit, or an abetment of the commission of, any offence described in subsection (2).

[19] Pursuant to s. 6(2) of the Act, an extradition offence is an offence which is equally punishable in the requesting State and in Malaysia with imprisonment for not less than one year or with death. There is however, a proviso which states that in the case of an extraterritorial offence it must be also be an offence which is punishable under the laws of Malaysia even if it took place outside Malaysia.

[20] The applicant is facing a total of five charges (indictments) in the US. One charge is for conspiracy to launder monetary instruments under Title 18 of the United States Code, § 1956(h) and the other charges are for international money laundering under Title 18 of the United States Code, § 1956(a)(2)(A).

[21] If committed within the jurisdiction of Malaysia, these offences correspond respectively with the offence of criminal conspiracy to commit a money laundering offence under s. 86A(1)(c) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFPUAA) and the offence of money laundering under s. 4(1) of the AMLATFPUAA.

[22] The offences under the law of the US provide, upon conviction, for a fine not exceeding USD500,000 or twice the value of monetary instrument or funds involved, whichever is greater, or imprisonment of not more than twenty years, or both. The offences under our AMLATFPUAA provide, upon conviction, for imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times of the amount involved or five million ringgit, whichever is the higher.

[23] In this regard, I find that the statutory threshold for penalty under s. 6(2) of the Extradition Act 1992 has been satisfied and the pending charges against the applicant in the US show that they are charges for extradition offences within the meaning of s. 6(2) of the Act. The pending charges against the applicant qualify the offences as extradition offences within the meaning of the Act. I am also satisfied that the element of dual criminality has been satisfied. Since the applicant is accused of extradition offences in the US and was, at the material time, in Malaysia, the applicant is a "fugitive criminal" within the meaning of s. 2 of the Act.

Applicable Procedure

[24] An application for a writ of *habeas corpus* by a person who is committed to prison under the Extradition Act 1992 is governed under the Criminal Procedure Code. This is provided for under s. 36 of the Act.

Section 36 of the Extradition Act 1992 provides as follows:

> Application for *habeas corpus*
>
> [36] A fugitive criminal who is committed to prison under this Act may apply to the High Court for a writ of *habeas corpus* in accordance with the procedure as provided in the Criminal Procedure Code.

Whether The Detention Was Lawful

[25] It is trite law that in an application for the issuance of a writ of *habeas corpus*, the burden rests on the detaining authority to satisfy the court that the detention is lawful and that the applicant is not entitled to *habeas corpus*. In

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC; [2010] 1 MLJ 149; [2009] 2 MLRA 631; [2010] 3 AMR 781, His Lordship Gopal Sri Ram FCJ (as His Lordship then was) reiterates the position of the law as follows:

> It is settled law that on an application for *habeas corpus* the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See, *Chng Suan Tze v. The Minister of Home Affairs & Ors And Other Appeals* [1988] 1 LNS 162. In *Mohinuddin v. District Magistrate, Beed* AIR [1987] SC 1977, the Supreme Court of India observed as follows in the context of art. 22 of the Indian Constitution from which is drawn our art. 151:
>
> > It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in art. 22(5).

(See also: *Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 8 CLJ 465 FC; [2019] 6 MLJ 220; [2019] 5 MLRA 1; [2019] 5 AMR 546).

Dispensation Of Prima Facie Requirement Under Section 20

[26] The procedures under s. 20 of the Extradition Act 1992 applies in cases where the Minister of Home Affairs gives a written direction pursuant to s. 4 of the Act. The order of the Minister under s. 4 relates to the dispensation of the *prima facie* requirement. Dispensation of the *prima facie* requirement must be provided for in the binding arrangement between Malaysia and the country which made the extradition request.

[27] Conversely, in the absence of a written direction of the Minister under s. 4 of the Act, proceedings to commit a fugitive criminal to prison pending his extradition are governed under s. 19 of the Act. Pursuant to s. 19, a *prima facie* case in support of the requisition for extradition must first be made out. If a *prima facie* case is not made out, the fugitive criminal must be discharged. If a *prima facie* case is made out, the court shall commit the fugitive criminal to prison pending the order of the Minister to extradite him.

Section 4 of the Act provides as follows:

> Direction of the Minister to apply procedure in s. 20
>
> [4] Where the binding arrangement which has been entered into between Malaysia and any country for the extradition of fugitive criminals contains a provision for the *prima facie* requirement to be dispensed with either

A generally or in relation to a class or classes of offences, the Minister may give a direction in writing that the procedure specified in s. 20 shall apply to such cases.

[28] Unlike proceedings under s. 19 of the Act, in proceedings under s. 20 of the Act, the consideration of any evidence to contradict the allegation that
B the respondent has committed the extradition offence for which his return is sought is expressly prohibited by virtue of s. 20(2) of the Act. What is left for the Sessions Court to consider is focused within the confines of paras. (a) to (e) of s. 20(1). Thus, in this context, it is pertinent to examine whether there is a written direction given by the Minister pursuant to and in the
C circumstances as contemplated by s. 4 of the Act.

[29] Paragraph 3 of the US Extradition Order provides that the provisions of the Extradition Act 1992 shall apply in relation to the United States of America. By para. 4 of the US Extradition Order, the US Extradition Treaty is annexed as part of the US Extradition Order. Article 7(3)(c) of the US
D Extradition Treaty provides, *inter alia*, that proof of a *prima facie* case against the fugitive criminal is not required as a condition for extradition.

[30] The written direction of the Minister is appended as exh. "M-5" in encl. 2. Exhibit "M-5" is the affidavit of Wan Nor Sakina binti Saad affirmed on 18 July 2019 in the proceedings before the Sessions Court. In
E that affidavit, the written direction of the Minister dated 8 July 2019 was appended as exh. "WNS-11". It directed for the procedures under s. 20 of the Act to apply.

[31] On these reasons, I find that the Minister had indeed gave a written
F direction under and pursuant to the circumstances as provided for under s. 4 of the Act. As such, the procedures under s. 20 of the Act must apply. (see: *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor* [2013] 5 CLJ 447 FC; [2013] 2 MLJ 478; [2013] 2 MLRA 626; [2013] 2 AMR 119).

Whether The Procedures Under Section 20 Have Been Complied With

G **[32]** In considering the application pursuant to s. 20 of the Act, it is mandatory for the Sessions Court to ensure that the conditions stipulated under paras. (a) to (e) are satisfied before the applicant may be committed to prison pending the order of the Minister of Home Affairs for his extradition. Paragraph (a) relates to the hearing of the application for
H committal. No issues. Paragraph (c) has been dealt with in the earlier part of this judgment. Paragraph (e) is not an issue as the applicant is not accused of an offence or undergoing any sentence for any offence committed in Malaysia. What remains to be considered concerns the conditions under paras. (b) and (d).

I

Supporting Documents

[33] Production of the supporting documents in relation to the offence is made mandatory by virtue of para. (b) of s. 20(1) and s. 20(3) defines what "supporting documents" are.

Section 20(3) of the Act reads as follows:

> Procedure before Sessions Court where a special direction has been given under s. 4
>
> [20] (3) In this section, "supporting documents" means:
>
> (a) any duly authenticated warrant for the arrest of the fugitive criminal issued by the country which seeks his return or any duly authenticated copy of such warrant;
>
> (b) any duly authenticated document to provide evidence of the fugitive criminal's conviction or sentence or the extent to which a sentence imposed has not been carried out;
>
> (c) a statement in writing setting out a description of, and the penalty applicable in respect of, the offence and a duly authenticated statement in writing setting out the conduct constituting the offence.

[34] In examining the affidavits, I find that the following supporting documents, as defined under s. 20(3) of the Act, have been produced before the Sessions Court:

(i) the warrant of arrest dated 5 February 2019 issued by G. Michael Harvey, the Honourable U.S. Magistrate Judge of the District Court of Columbia, Washington for the indictment of the applicant in the case of *United States of America v. Mun Chol Myong*, Case: 1:19-cr-147 on charges of conspiracy to launder monetary instruments under Title 18 of the U.S.C. § 1956(h) and international money laundering under Title 18 of the U.S.C. § 1956(a)(2);

(ii) the statement in writing setting out a description of and the penalty applicable in respect of the offence and a duly authenticated statement in writing setting out the conduct constituting the offence in the manner of:

(a) the affidavit together with its attachments affirmed on 28 May 2019 by Cindy Burnham, the special agent of the Federal Bureau of Investigation; and

(b) the affidavit together with its attachments affirmed on 30 May 2019 by Zia M Faruqi, the Assistant United States Attorney of the United States Attorney's Office,

(iii) a certificate dated 31 May 2019 under the hand of William P Barr, the Honourable Attorney General of the United States certifying Jeffrey M Olson, the Associate Director of the Office of International Affairs, Criminal Division of the United States Department of Justice, as duly commissioned and qualified to authenticate the affidavit.

[35] In the circumstances, I find that the condition under s. 20(1)(b) of the Act has been satisfied.

Whether The Applicant Has Provided Substantial Grounds To Satisfy The Court To Believe In The Existence Of The Circumstances Under Subparagraphs (i) to (v) Of Section 20(1)(d)

[36] There are five situations under para. (d) of s. 20(1) of the Act which are opened to the applicant to avail himself. In this regard, learned counsel relies on sub-para. (i) and contends that the offences for which the request for extradition is made by the US are offences of a political character.

Whether The Offences For Which The Request For Extradition Of The Applicant Is Made Are Offences Of A Political Character

[37] The applicant contends that the offences for which the extradition of the applicant is requested are political offences and/or of political character and the Sessions Court ought to have discharged the applicant. Further, para. (a) of s. 8 prohibits the surrender of a fugitive criminal if the offence for which his return is sought is of a political character.

[38] A reading of sub-para. (i) of s. 20(1)(d) of the Act shows that the burden rests on the applicant to satisfy the court of the statutory bar to extradition, namely that there are substantial grounds for believing that the offence is an offence of a political character.

Contextually, s. 20(1)(d)(i) of the Extradition Act 1992 reads as follows:

> Procedure before Sessions Court where a special direction has been given under s. 4
>
> 20. (1) Where a direction has been given by the Minister under s. 4, the Sessions Court shall:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) if the fugitive criminal does not satisfy the Court that there are substantial grounds for believing that:
>
> (i) the offence is an offence of a political character, or that the proceedings are being taken with a view to try or punish him for an offence of a political character;
>
> (ii) ...;

(iii) ...;

(iv) ...;

(v) ...;

(e) ...,

commit the fugitive criminal to prison to await the order by the Minister for his surrender.

[39] The statutory bar to extradition under the Extradition Act 1992 relates to offences of a political character. (see paras. (a), (b) and (c) of s. 8 of the Extradition Act 1992). A corresponding provision is also made in para. 4 of the US Extradition Order. It is meant to protect the offender from prosecution for political crimes or prosecution actuated purely by political motivation by the requesting State. Be that as it may, the term "offences of a political character" is not defined in the Extradition Act 1992.

[40] In *In Re Castioni* [1891] 1 QB 149, Angelo Castioni was arrested in England and committed to prison by the Magistrate on a request for extradition by the Swiss Government. Castioni faced a charge of wilful murder alleged to have been committed in Switzerland. The deceased, Luigi Rossi was gunned down in the canton or territory of Ticino, Switzerland. Rossi was a member of the State Council of Ticino and Castioni resided in the same territory. Prior to the incident, a substantial number of residents in Ticino expressed dissatisfaction at the manner in which the political party then was governing. A request was made for the constitution to be revised but the Government declined the revision.

[41] On 11 September 1890, a number of citizens, including Castioni, seized the arsenal and took rifles and ammunition. They disarmed the army, arrested, bound and handcuffed several persons connected with the government and forced them to march to the municipal palace. They broke open the outer gate of the palace and rushed in. Castioni who was armed with a revolver was among the first to enter. The deceased was in the passage and was shot dead in the commotion. Castioni escaped to England but was committed to prison for extradition.

[42] On a motion for *habeas corpus*, the meaning of the term "an offence of a political character" under s. 3(1) of the English Extradition Act 1870 which is very much in *pari materia* with s. 8(a) of the Malaysian Extradition Act 1992 was considered. It reads as follows:

3. The following restrictions shall be observed with respect to the surrender of fugitive criminals:

(1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the Court before whom he is brought on *habeas corpus*, or to the

A Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

[43] In allowing the application for *habeas corpus*, the English court held that the offence which was committed by Castioni was incidental to and B formed part of political disturbances and therefore was an offence of a political character within the meaning of the statute. It was observed that Castioni had no ill-will against the deceased but the act was committed with the object of promoting the purpose of the rising.

[44] In *Schtraks v. Government of Israel And Others* [1962] 3 All ER 529 PC, C a boy, Joseph Schuchmacher, was left temporarily in Jerusalem in 1957 by his parents due to financial difficulties. The boy was left in the care of his grandparents, Nachman and Miriam Schtraks who were orthodox Jews. In September 1959, the parents asked for the return of the boy but the grandparents refused as they feared the boy would not receive religious D education in accordance with their views.

[45] Despite an order of the High Court for the grandparents to return the boy to his parents, the grandparents refused. The parents brought contempt proceedings against the grandparents and included the appellant, Shalom Schtraks, as a party for assisting to withhold the boy from his parents. In the E contempt proceedings, the appellant gave evidence that he had not seen the boy since 1 January 1960. The contempt proceedings against the appellant was dismissed but the grandfather was committed to prison.

[46] The appellant later arrived in the United Kingdom on 23 May 1960. F In August 1961, the Israeli police arrested three persons in the course of searching for the boy's whereabouts. All the three persons who were arrested informed the Israeli police that two or three weeks after 1 January 1960, the appellant and the boy had come to their village. The appellant had arranged for the boy to stay for a while with one of them.

G **[47]** The government of Israel later made a request to extradite the appellant on a charge of perjury in the contempt proceedings at the High Court and another charge for child-stealing. The Magistrate made an order to commit the appellant to prison to await extradition to Israel. The appellant challenged his committal as unlawful on the grounds that the offence was of a political character as the matter has become a political issue in Israel and H a symbol of importance in the contest between the secular ruling Government and the orthodox Jews. The appellant and the grandparents are orthodox Jews and they are said to have taken a stand against the secular represented by the parents of the boy.

I **[48]** On an appeal against refusal of the divisional court to grant *habeas corpus*, the House of Lords held, *inter alia*, that extradition should not be refused as the offences were not of a political character.

[49] In *Schtraks*' case, the House of Lords speaking through the judgment of His Lordship Viscount Radcliffe made the following remarks at p. 540:

> In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country. The analogy of "political" in this context is with "political" in such phrases as "political refugee", "political asylum" or "political prisoner". It does indicate, I think, that the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect. ... There may, for instance, be all sorts of contending political organisations or forces in a country, and members of them may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends: but if the central government stands apart and is concerned only to enforce the criminal law that has been violated by these contestants, I see no reason why fugitives should be protected by this country from its jurisdiction on the ground that they are political offenders.

[50] In the present application, it is observed that the learned Sessions Court Judge has satisfied herself that there are no substantial grounds for believing that offence in the US with which the applicant is charged is an offence of a political character. In her reasoning appended in encl. 13 as exh. "WNSS-1", the learned Sessions Court Judge said as follows:

> [61] Mengguna pakai tujuan dan tafsiran non literal seksyen 20(1)(d)(i) Akta 479, ia merupakan salah satu pengecualian bagi pengekstradisian Responden kepada Kerajaan AS. Mahkamah hanya perlu berpuas hati bahawa kesalahan yang dilakukan bukan bersifat politik iaitu kesalahan yang berkaitan dengan suasana politik sesuatu negara. Mahkamah mengambil notis kehakiman bahawa wujud hubungan diplomatik yang dingin antara Kerajaan AS dan PRNK dan sanksi ekonomi yang dikenakan oleh Kerajaan AS ke atas PRNK melibatkan perdagangan antara dua negara. Responden telah membawa keluar duit dari bank-bank yang terdapat di Amerika Syarikat untuk dibawa masuk ke akaun PRNK melalui FTB dan urusan perdagangan dibuat dengan menggunakan emel Responden semasa Responden berada di Singapura. *Ini merupakan perbuatan seorang individu iaitu Responden yang melibatkan urusan perdagangan antarabangsa, komersil dan kewangan bukannya kesalahan yang melibatkan Responden dengan negaranya sendiri atau Kerajaan AS iaitu cuba melawan, menjatuhkan kerajaan atau ekonomi kerajaan mana-mana negara tersebut*.
>
> [62] Berpandukan kepada nas dan perimbangan di atas, *saya berpendapat perkataan 'political character' merujuk kepada apa-apa kesalahan yang dilakukan oleh mana-mana individu terhadap satu kerajaan negeri yang berkaitan dengan suasana politik semasa suatu kesalahan itu dilakukan*. Kesalahan pengubahan wang haram dan pensubahatannya bukan merupakan kesalahan bersifat politik di bawah seksyen 20(1)(d)(i) Akta 479.
>
> (emphasis added)

[51] The description of the term "offences of a political character" as alluded to by His Lordship Viscount Radcliffe in *Schtraks*' case, to my mind, appears suitable to describe the statutory bar to extradition within the meaning intended by the Act. I hold the considered view that where the supporting documents demonstrate a violation of the criminal law in the requesting State and the request for extradition is clearly connected with the effort of the requesting State to enforce the violation of that criminal law, it cannot by any means be described as an offence of a political character. In other words, an act which can be brought within the ambit of the criminal law of the requesting State cannot be political. I am of the considered view that the reasons advanced by the learned Sessions Court Judge in this respect is well-founded.

[52] Despite challenging the detention order on the basis that the request for extradition is based on politically-charged offences, I find that the applicant did not provide sufficient evidence to support this challenge against the backdrop of the money laundering-related indictments. There is also nothing to suggest that the applicant, as an individual, is at odds with the US on issues relating to political control or the government of the day. The fact that the US is seeking to enforce Title 18 of the U.S.C. against the applicant and the written statement describing the circumstances of the commission of the extradition offence in the circumstances of the present application is sufficient to dispel any suggestion that the offences are offences of a political character. I find that the applicant has failed to discharge the onus placed on him under s. 20(1)(d)(i) of the Act.

Sufficiency Of Evidence For Extradition Request

[53] Learned counsel for the applicant also contends that the evidence adduced by the US authorities in support of the request for the applicant to be extradited is not sufficient. There was no documentary evidence produced to support the pending charges (indictments) in the US against the applicant.

[54] With regard to sufficiency of the evidence produced by the requesting State to support the request for extradition, I have dealt with this issue at the onset. Suffice for me to recapitulate that s. 20(2) of the Act prohibits the applicant from adducing and the court from receiving any evidence to contradict the allegation that the applicant has committed the extradition offence for which his return is sought by the requesting State.

[55] The Federal Court in *Said Mir Bahrami* (*supra*) clearly emphasised the position of the law that extradition proceedings cannot be liken to a trial simply because by nature, it is a committal proceedings. In delivering the decision of the apex court, His Lordship Raus Sharif PCA (later CJ) further observed that in an application made pursuant to s. 20 of the Extradition Act 1992, both parties are given fair and equal opportunity to be heard. His Lordship said as follows:

> [18] But, it does not mean that there is no rule or procedure that needs to be followed in extradition. Section 20 of the Extradition Act has been drafted in a comprehensive way which enables both the prosecution as well as the defence to be heard fairly. It lays down the need for the prosecution to provide the supporting documents in relation to the request for extradition. Further it also stipulates the necessity for the Sessions Court Judge to be satisfied that the alleged act or omission of the fugitive criminal would if it had taken place in Malaysia constitute an offence under the laws of Malaysia. Notwithstanding this, s. 20 of the Extradition Act also provides for the defence that could be raised by the fugitive criminal in opposing the application for extradition.

[56] The powers of the Sessions Court are limited and clearly spelt out under s. 20 of the Extradition Act 1992. In considering the application for a warrant of committal, the Sessions Court is not at liberty to be concerned with the question of the evidence constituting the offence in the requesting State of which it has no jurisdiction. That is a matter to be dealt with by the trial court in the requesting State.

[57] The Sessions Court must only be concerned with whether the conditions for committal as stipulated under the Extradition Act 1992 have been met by the detaining authority. If they have, then the warrant of committal must be issued. Otherwise, the detenu must be discharged. There is no determination of whether the detenu is guilty or not guilty. A court sitting in a committal proceedings for the purposes of an extradition request is not expected to follow the normal procedures in a trial. In that sense, extradition proceedings are *sui generis* and cannot be liken to a criminal trial. After all, it is a committal proceedings and not a trial.

Conclusion

[58] On the basis of the aforesaid reasons, I find that there is no procedural irregularity in the issuance of the warrant for committal of the applicant by the learned Sessions Court Judge. I hereby dismiss the applicant's application for a writ of *habeas corpus* and uphold the warrant for committal granted by the Sessions Court to detain the applicant pending the issuance of the order by the Minister for his surrender.